Supreme Court, U.S.
FILED
FEB 17 1997
CLERK

No. 97-1196

In The

Supreme Court of the United States

October Term, 1997

John E. Burgess,
Petitioner,

v.

GEORGE G. LOGAN, DAVE ADAMS, KEN DEVOE, GREG OLZAK, RICHARD ROGERS, DENNIS ANDERSON, ANDY KROTIK, TOM LIBERTY, MOHAMMED KHATHAMI, JOHN HAUG,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

George G. Logan
2669 Alabama Street
Atwater, CA 95301
(209) 357-3064

2+1 pp

QUESTIONS PRESENTED

The following questions are the appropriate questions for review:

1. Is the Petitioner barred by collateral estoppel from questioning the stipulated judgment in Merced Superior Court Case # 123159?

2. Is the Petitioner barred by collateral estoppel from questioning the validity of the judgment in Merced Superior Court Case # 124708?

PARTIES BELOW

Petitioner John E. Burgess was the plaintiff-appellant in the court below. Respondents George G. Logan, Dave Adams, Ken Devoe, Greg Olzak, Richard Rogers, Dennis Anderson, Andy Krotik, Tom Liberty, Mohammed Khathami, and John Haug were defendants-appellants in the court below.

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Brief in Opposition to Petition for a Writ of Certiorari

The Respondents by and through their attorney, George G. Logan, hereby file the instant brief in opposition to the Petition for a writ of Certiorari filed herein

Pertinent Facts Misstated or Omitted from the Petition

The Petition misstates or omits the following pertinent facts.

1. On February 24, 1995, an Alternative Writ of Mandate was issued in Merced Superior Court Case # 123159. A copy of this document is reproduced as Appendix 1 to this Brief, page 4-7. (This document is Exhibit B in the record below). As can be seen, the Writ concerned the same proposed subdivision as were addressed in the Complaint in the District Court below, i.e. the Cottage Gardens Subdivision and involved the same issue, i.e., the Notice of Violation recorded against said subdivision.

2. On March 14, 1995, in Merced Superior Court Case # 123159, an Interim Order was issued which joined John Burgess, the Petitioner, herein as Cross-Defendant and indicated that both Gladwin Ensz and John Burgess were represented by the same attorney, i.e. Bernard Libante. This Interim Order is reproduced as Appendix 2 to this Brief, page 8-10. (This document is Exhibit C in the record below).

3. On July 10, 1995, a Stipulation for Judgment was filed in Merced Superior Court Case # 123159 in which Bernard Libante, the attorney for both Mr. Burgess and Mr. Ensz stipulated that "the City of Atwater, its officers and employees have committed no wrongful acts as concerns the properties in question" this Stipulation is reproduced as Appendix 3 to this Brief, page 11-13. (This document is Exhibit E in the record below).

4. On December 18, 1995, the Merced Superior Court issued its Judgment of Dismissal in Case # 124708 awarding costs of $1,820.00 to the Defendants therein. This Judgment is reproduced as Appendix 4 to this Brief, page 14-15. (This document is Exhibit E in the record below).

5. California Government Code Section 6103.5 provides a procedure whereby costs can be recovered by a prevailing party in a judgment even though no costs were incurred by said party. (Said Section is reproduced as Appendix 5 to this Brief, page 16-17).

6. California Code of Civil Procedure Sub-sections 473(b) and 473(d) provide procedures whereof an aggrieved party may set aside voidable and void judgments. (Said Sub-sections are reproduced as Appendix 6 to this Brief, page 18-19).

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1. **The Decision below was correct that the doctrine of Collateral Estoppel required the Dismissal**

In Merced Superior Court Case # 123159, it was stipulated by Mr. Burgess' attorney that Mr. Ensz was an owner of the Cottage Gardens Subdivision. In the instant Petition for Writ of Certiorari Mr. Burgess asserts that he was an owner of the same property and that he had an agreement with Ensz for subdividing the property (p.4, par. 1). So, Burgess and Ensz were co-owners and co-developers of the affected property and were both represented in court by the same lawyer who entered into the aforesaid stipulation. The Circuit Court was correct therefore in concluded that the doctrine of collateral estoppel precluded Mr. Burgess from re-litigation the same matter:

Mr. Burgess also complains about a fraudulent judgment for costs which was entered in Merced Superior Court Case # 124708. He had an ample opportunity under Code of Civil Procedure Section 473(b) or Section 473(d) to set aside the judgment. His failure to do so likewise is a collateral estoppel against using that judgment as the basis for the instant action.

Conclusion

For the reasons stated, it is requested that the Petition for Writ of Certiorari be denied.

APPENDIX 1

BERNERD LIBANTE, ESQ.
SBN 59665
14127 Capri Drive, Suite 6
Los Gatos, CA 95030-1534

Telephone: (408) 374-9400

Attorney for Petitioner

IN THE SUPERIOR COURT OF THE STATE OF

CALIFORNIA

IN AND FOR THE COUNTY OF MERCED

GLADWIN ENSZ,	)	No: 123159
	)	
Petitioner,	)	ALTERNATIVE WRIT
	)	OF MANDATE AND
v.	)	PROHIBITION
	)	
CITY OF ATWATER, DAVID	)	DATE:
ADAMS, City Manager, LINDA	)	TIME:
FERRERO, Planning Director,	)	DEPT:
MOHAMMED KATAMI,	)	
Associate Planner, KEN DeVOE,)		

Mayor, GREG OLZACK, RICHARD ROGERS, DENNIS ANDERSON, ANDY KROTIK, City Council Members, GEORGE LOGAN, City Attorney, and DOES 1 to 100, inclusive,

Respondents.

TO: CITY OF ATWATER, DAVID ADAMS, City Manager, LINDA FERRERO, Planning Director MOHAMMED KATAMI, Associate Planner, KEN DeVOE, Mayor, GREG OLZACK, RICHARD ROGERS, DENNIS ANDERSON, ANDY KROTIK, City Council Members, GEORGE LOGAN, City Attorney, and DOES 1 to 100, inclusive, and all others acting in concert with them:

You and each of you are hereby commanded forthwith to issue to Gladwin Ensz, such permits as are necessary for him to commence and complete construction of the Cottage Gardens

development, as set forth in the final plan, recorded in the Recorder's Office of the County of Merced, Map Book 44, pages 45, 46 and 47, and forthwith to rescind that certain Notice of Violation, recorded on behalf of the City of Atwater in the Recorder's Office of the County of Merced, on December 1, 1994, located at vol. 3303, page 894.

In the alternative, you are commanded to appear at the above entitled court, located at 2222 M Street, Merced, California, in Department I, at 8:30 a.m., on March 10, 1995, then and there to show cause, if any you have, why you should not peremptorily be ordered to do so.

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WILLFUL FAILURE TO COMPLY WITH THE ORDERS CONTAINED IN THIS WRIT MAY BE PUNISHED AS A CONTEMPT OF THIS COURT.

DATED: FEBRUARY 24, 1995 /s/ MICHAEL S. HIDER
JUDGE OF THE
SUPERIOR COURT

APPENDIX 2

CITY OF ATWATER
GEORGE G. LOGAN
City Attorney
750 Bellevue Road
Atwater, CA 95301

(209) 357-6302

Filed: March 14, 1995
Time: 11:43 a.m
Leland P. Haugen Merced Superior Court
By: Patricia Lopez

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MERCED

GLADWIN ENSZ,	)	
	)	
Petitioner,	)	Case No.: 123159
	)	
v.	)	INTERIM ORDER
	)	
THE CITY OF ATWATER,	)	
DAVID ADAMS, City	)	
Manager, LINDA	)	

FERRERO, Planning Director,)
MOHAMMED KATAMI,)
Associate Planner, KEN)
DeVOE, Mayor, GREG)
OLZACK, RICHARD)
ROGERS, DENNIS)
ANDERSON, ANDY)
KROTIK, City Council)
Members, GEORGE)
LOGAN, City Attorney, and)
DOES 1 to 100, inclusive,)
)
Respondents.)

The above matter came on for hearing at 8:30 a.m. on March 10, 1995. The Plaintiff, Gladwin Ensz, and the Cross Defendant, John Burgess, being represented by Bernerd Libante and the City of Atwater being represented by George Logan.

IT IS ORDERED as follows:

1. The Cross-Complaint by the City of Atwater against John Burgess shall be considered as a Complaint for Declaratory Relief.

2. The Application (Petition) on file herein shall be adopted by John Burgess as the Answer to the Complaint for Declaratory Relief.

3. The case of the City of Atwater for Declaratory Relief against John Burgess shall be consolidated in with this case No. 123159.

4. The matter is set for trial on April 5, 1995 at 10:00 a.m.

5. The witnesses John Burgess and Gladwin Ensz are ordered to appear at said time and date.

Dated: March 14, 1995

/s/ DENNIS A. CORNELL
Dennis A. Cornell
Judge, Superior Court
County of Merced, CA

APPENDIX 3

CITY OF ATWATER
GEORGE G. LOGAN
City Attorney
750 Bellevue Road
Atwater, CA 95301

(209) 357-6302

Filed: July 10, 1995
Time: 11:06 a.m.
Leland P. Haugen Merced Superior Court
By: Zelena K. Smith

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MERCED

GLADWIN ENSZ,	)	
	)	
Petitioner,	)	Case No.: 123159
	)	
v.	)	STIPULATION FOR
	)	JUDGMENT
THE CITY OF ATWATER, et al.,	)	
	)	
	)	
Respondents.	)	

GLADWIN ENSZ, Plaintiff and the CITY OF ATWATER, Defendant, do hereby stipulate as follows:

1. Plaintiff is the owner of the lots which are the subject of this litigation.

2. Plaintiff consents to the formation of the assessment/maintenance districts as demanded by the City of Atwater and will do all acts necessary to complete the same.

3. The City of Atwater, its officers and employees have committed no wrongful acts as concerns the properties in question.

4. Judgment may be entered in favor of the City in this matter, each party to bear its own costs.

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Dated: 7/6/95

/s/ Bernerd Libante
BERNERD LIBANTE
Attorney for Plaintiff

Dated: 7-7-95

/s/ George Logan
GEORGE G. LOGAN
Attorney for the Defendants

APPENDIX 4

CITY OF ATWATER
GEORGE G. LOGAN
City Attorney
750 Bellevue Road
Atwater, CA 95301

(209) 357-6302

Filed: December 18, 1995
Time: 8:56 a.m.
Leland P. Haugen Merced Superior Court
By: Zelena K. Smith

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MERCED

John E. Burgess	)	
	)	
Plaintiff,	)	Case No.: 124708
	)	
v.	)	**JUDGMENT OF**
	)	**DISMISSAL**
George G. Logan, et al.,	)	
	)	Recorded: Dec. 18, 1995
Defendant.	)	in book: 95-27 page 95
	)	JUDGMENTS

This case having been dismissed on October 19, 1995; the Defendants having timely filed a Memorandum of Costs; and, no objection to said Memorandum and no Motion to Tax Costs being timely filed, Judgment of Dismissal is hereby granted to Defendants. Defendants are further granted a judgment for costs against the Plaintiff in the sum of $1,820.00.

Dated: December 18, 1995

/s/ William T. Ivey
Judge, Merced County
Superior Court

APPENDIX 5

California Government Code § 6103.5

§ 6103.5. Inclusion of filing fee as part of judgment; Collection; Writ of execution.

(a) Whenever a judgment is recovered by a public agency named in Section 6103, either as plaintiff of petitioner or as defendant or respondent, in any action or proceeding to begin, or to defend, which under the provisions of Section 6103 no fee for any official service rendered by the clerk of the court, including, but not limited to, the services of filing, certifying, and preparing transcripts, nor fee for service of process or notices by a sheriff or marshal has been paid, other than in a condemnation proceeding, quiet title action, action for the forfeiture of a fish net or nets or action for the forfeiture of an automobile or automobiles, the clerk entering the judgment shall include as a part of the judgment the amount of the filing fee, and the amount of the fee for the service of process or notices which would have been paid but for Section 6103, designating it as such. The clerk entering the judgment shall include as part of the judgment the amount of the fees for certifying and preparing transcripts if the court has, in its discretion, ordered those fees to be paid.

(b) When an amount equal to the clerk's fees and the fees for service of process and notices is collected upon a judgment pursuant to subdivision (a), those amounts shall be due and payable to the clerk and the serving officer respectively. The clerk shall ascertain from the serving officer's return the amount

of fees he or she would have charged had it not been for the provisions of Section 6103. Remittances of the amounts so due shall be made within 45 days by the fiscal officer of the plaintiff or petitioner or respondent or defendant in the action or proceeding unless those fees have been collected by the levying officer and remitted to the court. No interest shall be computed or charged on the amount of the fee. ***If the judgment pursuant to subdivision (a) consists only of the amount of the filing fee, it shall be at the public agency's discretion whether to seek collection. If the public agency determines not to seek collection of the filing fee, is shall notify the clerk and no further action as provided for in this section may be brought against the public agency.***

(c) If the remittance is not received within 45 days of the filing of a partial satisfaction of judgment in an amount at least equal to the fees due to the clerk or a satisfaction of judgment has been filed, notwithstanding any other provision of law and except as provided in subdivision (b), the court may issue a writ of execution for recovery from the public agency of those fees plus the fees for issuance and execution of the writ plus a fee for administering this section.

(d) The board of supervisors shall set a fee, not to exceed the actual costs of administering this section, up to a maximum of twenty-five dollars ($25), which shall be added to the writ of execution.

APPENDIX 6

California Code of Civil Procedure
Sub-sections 473(b) & 473(d)

(b) The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken. However, in the case of a judgment, dismissal, order, or other proceeding determining the ownership or right to possession of real or personal property, without extending the six-month period, when a notice in writing is personally served within the State of California both upon the party against whom the judgment, dismissal, order, or other proceeding has been taken, and upon his or her attorney of record, if any, notifying that party and his or her attorney of record, if any, that the order, judgment, dismissal, or other proceeding was taken against him or her and that any rights the party has to apply for relief under the provisions of Section 473 of the Code of Civil Procedure shall expire 90 days after service of the notice, then the application shall be made within 90 days after service of the notice upon the defaulting party or his or her attorney of record, if any, whichever service shall be later. No affidavit or

declaration of merits shall be required of the moving party. Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties. However, this section shall not lengthen the time within which an action shall be brought to trial pursuant to Section 583.310.

(d) The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order. Amended Stats 1996 ch 60 § 1 (SB 52).